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CITATIONS

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 31

W. WILLARD WIRTZ, SECRETARY OF LABOR, PETITIONER

v.

STEEPLETON GENERAL TIRE COMPANY, INC., AND A. E. STEEPLETON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 32a–39a) [1] are unofficially reported in 15 WH Cases 582 and 45 Lab. Cases ¶ 31,315. The opinion of the court of appeals (R. 895a–902a) is reported at 330 F. 2d 804.

JURISDICTION

The judgments of the court of appeals were entered on April 27, 1964 (R. 902a). A petition for rehearing

[1] "R." refers to the printed Transcript of Record in two volumes, and "App.," to the appendix to this brief.

was denied on August 3, 1964 (R. 903a). The petition for a writ of certiorari was granted March 1, 1965 (R. 905a). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether respondents' sales of tires and tire services, at substantial discounts, to trucking companies, other operators of fleets of vehicles, and governmental agencies were "recognized as retail sales or services in the particular industry" within the meaning of § 13 (a) (2) and (4) of the Fair Labor Standards Act, thereby entitling respondent to exemption as a "retail or service establishment" from the minimum-wage and overtime provisions of the Act.

STATUTES INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 63 Stat. 910 (29 U.S.C. 201, *et seq.*), are set forth in App. B, *infra*, pp. 47–48. The provision particularly involved here is Section 13(a)(2) which reads as follows:

> The provisions of section 6 and 7 shall not apply with respect to * * * any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located * * *. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as

retail sales or services in the particular industry; * * *.

STATEMENT

This action was brought by the Secretary of Labor under § 17 of the Fair Labor Standards Act (29 U.S.C. 217) to restrain violations of the minimum wage, overtime, and record-keeping requirements of the Act (R. 8a, 18a). Respondent admitted that it had not complied with those requirements (R. 22a, 30a), but contended that its employees were not engaged in interstate activities within the Act's coverage, and that the business was an exempt "retail or service establishment" under §§ 13(a)(2) and 13(a)(4) of the Act (R. 13a-16a). The court of appeals, affirming the district court, held (1) that the employees were "engaged in commerce or in the production of goods for commerce" within the Act's coverage, but (2) that respondent's business was exempt as a "retail or service establishment," because more than 75% of its sales were "not for resale" and were "recognized as retail sales or services in the particular industry" within the meaning of § 13(a)(2).

1. Respondent Steepleton General Tire Company, Inc. ("Steepleton"),[2] a franchised dealer for General Tire & Rubber Company at Memphis, Tennessee, is engaged in selling, repairing and servicing tires in an area which includes neighboring parts of Tennessee, Arkansas, and Mississippi (R. 33a, 46a, 109a). During the period involved in this suit the company

[2] The President of the corporation, A. E. Steepleton, was also joined as a defendant, but for simplicity we will refer to the corporation as the sole respondent.

did a gross annual business of over $900,000, and employed about 47 employees (R. 28a, 33a), many of whom were regularly employed to make sales and deliveries of merchandise in interstate commerce; to recap tires for delivery out-of-State; and to remove, repair, recap and mount tires for commercial vehicles operated by customers in interstate commerce (R. 33a, Fdg. 4).

More than half of Steepleton's dollar volume of business is derived from sales to customers operating multiple units, or "fleets", of commercial vehicles and to industrial enterprises such as construction contractors operating heavy earth-moving equipment in the construction of highways and river improvements (R. 76a, 77a, 109a–110a, 177a, 185a–186a, 247a–248a). While respondent offered no evidence of the percentage of its sales of tires and services to particular customers or specific types of customers, the record is clear that most, if not all, of the largest customers operate their vehicles substantially in interstate commerce.[3] For such large customers, respondent fur-

[3] These customers include, for example, Gordon's Transport Company, a multi-state common carrier operating about 1,000 vehicles (R. 110a, 216a); Southwestern Transportation Company (probably Steepleton's largest customer, R. 75a), another interstate common carrier, at whose place of business Steepleton keeps an employee every day to handle the large volume of business for "those trucks [which] come in and out of there at all times of the day and night" (R. 79a, 109a–110a); White Rose Industrial Laundry, which operates a fleet of 75 trucks and cars, with at least 23 trucks operating regularly in interstate transportation (R. 166a–167a); Woody Herrin, a produce dealer, who regularly operated eight over-the-road refrigerated transport trucks traveling to practically every state in the Union (R. 177a) which were serviced two or three times a

nishes regular repair, replacement and inspection services, not only in its shop (which remains open 12 hours a day and provides round-the-clock emergency call service, R. 78a, 122a–123a, 234a), but also daily or weekly at the major customers' own places of business, adapting the services to the customers' special needs (R. 78a–79a, 109a–110a, see fn. 3, p. 4, *supra*). Seventy-five per cent of the respondent's recapping and repair services, alone comprising 35% of its gross dollar volume of sales, is performed on tires for trucks or other heavy industrial equipment of its commercial customers. (R. 48a, 265a.)

2. Representatives of the tire industry (whose testimony was confirmed by respondent's expert witness, Dr. Leigh, R. 793a–795a) testified that it is the practice of large tire establishments (such as Steepleton) to divide their sales operations into three compartments—"a tire division selling at retail, a tire division selling commercially, and a tire division selling at wholesale" (R. 345a). The "retail" division typically makes over-the-counter sales of passenger tires in small quantities to individual purchasers for their personal use. The wholesale division handles

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week by Steepleton's employees (R. 178a); Robilio and Cuneo, food products manufacturers operating several of their 23 vehicles in transporting their products to three other States (R. 181a); Klinke-Reed Dairy, three of whose trucks regularly traveled between Tennessee and Arkansas (R. 174a); A. S. Barbaro, a wholesale beer distributor regularly operating two over-the-road transport trucks which hauled beer from Belleville, Illinois, to Memphis (R. 213a); and Central States Dredging Company, which operated 14 vehicles including Mack dump trucks and pickups used in dredging and hauling supplies in five States (R. 185a–186a).

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sales to dealers for resale. And the third, or "commercial," division ordinarily specializes in the sale of truck tires, usually in large quantities, to trucking fleets, construction companies, airlines, or other commercial users. To solicit the commercial sales, such establishments, including respondent Steepleton, employ a separate staff of "commercial," as distinguished from "retail," salesmen (*e.g.*, R. 51a, 105a–106a, 263a, 344a–345a, 401a–402a, 404a, 467a–469a, 440a, 453a–454a, 793a–795a).

Mr. Marsh, the executive director of the industry's trade association testified that the "series of discounts on commercial tires and truck tires is different from the deals made on new passenger tires" (R. 345a). In a letter to the Wage-Hour Administrator, he explained that "the custom in the industry [is] to sell at a price which declines as the amount of tires purchased by a buyer increases," in accordance with a generally recognized scale of discounts (often recommended by the manufacturer) from the manufacturer's list prices, with the specified discount percentages differing for sales to commercial users, to the large fleets, and for national accounts (R. 870a–872a).[4]

[4] Marsh described the scale of discounts as follows (R. 871a):

> * * * Recommended discounts for truck tires to the commercial users are 10–10% [*i.e.*, 19%, the second 10% discount being based on the price remaining after the first] with a suggested 10–10–10% for the larger fleets and 10–10–10–10% where delivery is made to "national" accounts such as Swift & Co. operating motor vehicles in many places. (One larger tire manufacturer has a discount program of 10–10–10–5%, with an increase to as much as 10–10–10–10–10–5% for the very large buyer; if the dealer sells at this latter discount, he can replace his

Such reductions are offered because of the advantages stemming from large-volume sales (R. 871a).

Also introduced in evidence was the Wage and Hour Administrator's Interpretive Bulletin classifying sales in the tire trade (Pltf. Ex. 6, printed as App. A, *infra*, pp. 43–46). The Bulletin classified as other than "retail": (1) sales made pursuant to a formal invitation to bid, such as are typically made to government agencies; (2) sales made to "national accounts" (sales in which delivery is made by a local tire dealer under a centralized pricing arrangement between the customer's national office and the tire manufacturer); and (3) sales to "fleet accounts" (customers operating five or more vehicles) at prices equivalent to those charged on sales for resale.

3. The representatives of the tire industry further testified that the word "retail" was generally used in the tire industry to denote any sale not for resale, regardless of the kind or number of tires sold, the discounts given, the nature of the customer, or any other functional characteristic (*e.g.*, R. 235a, 288a–289a, 303a, 397a, 404a, 461a, 467a–468a, 656a–657a). There was testimony, for example, that the quantity sale, or

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stock from the manufacturer at a corresponding discount.) Technically, the independent tire dealer can refuse to deliver his merchandise to consumer purchasers at these discounted prices, but he makes such a decision with full knowledge that the company-owned store of one of the tire manufacturers will quickly take over the account and might even quote a larger discount.

Again, many of our members sell tires in large quantities to trucking companies at a special discount from the list price, both the discount and the list price being suggested by the manufacturer.

specialized retreading, of airplane tires for a commercial airline; the sale of thousand-pound "earthmover" tires to a construction company; or the sale, at a substantial discount, of 50 to 100 of the largest type truck tires to an interstate common carrier, would all be characterized as "retail" no less than the over-the-counter sale of a single passenger tire to an individual purchaser (R. 247a–249a, 258a–261a, 690a–692a). This use of the word "retail," as synonymous with "not for resale", was confirmed by Dr. Leigh, respondent's expert witness (R. 429a, 434a–458a), and accounting documents dating from 1934 showed that the usage was of long standing in the industry.

The only explanation offered for the industry's usage was that it conforms with most State sales tax statutes (including Tennessee's) and hence facilitates the computation and payment of the tax (R. 236a-239a, 248a–249a, 253a, 303a, 353a, 397a, 579a). Thus respondent Steepleton explained that he classified as "retail" quantity sales of the largest type truck tires for customers like Gordon's Transports, sales of Earthmover tires to contracting companies, and sales of aircraft tires for large commercial airlines (R. 247a–248a) because: "We would still have to charge sales tax on this * * * so it would still be a retail sale" (R. 249a). Similarly, the trade association executive secretary (Marsh) stated that characteristics such as "discount or price or quantity or anything else" "would have very little effect on the tire dealers' classification of the sale because in the majority of the States in the United States, they must classify a sale to a user for sales tax purposes * * *" (R. 303a). He

explained that he would classify as "retail" even quantity sales of "earth moving tires for big equipment on a big contracting job," because "if they were in the State of Ohio we would have to pay sales tax" on such sales (R. 353a).[5]

The record also shows frequent use in the industry of the term "retail" in various other senses—*e.g.*, in the distinction drawn by the same industry witnesses between the "retail" departments (over-the-counter sales of passenger-car tires) and the "commercial" departments (sales of truck tires to commercial users) of the larger establishments (see pp. 5–7, *supra*). As the trial court's findings confirm, some tire dealers segregate "commercial accounts sales" into a separate category "covering truck tire sales to business firms" to whom sales are made "for only a small margin over their cost" and "[p]articular salesmen may be assigned by a dealer to specialize in sales of this nature" (R. 36a). Also, as the court of appeals acknowledged, some of respondents' commercial *customers*

[5] Dr. Brooks, a marketing economics expert testifying on behalf of the Secretary, pointed out that sales tax statutes are designed "to collect revenue," and that the term "retail" in such statutes is defined for the sole purpose of designating those sales on which the tax must be paid (R. 721a–722a). Apart from this purpose of the tax statutes, he did not know "any respectable authority that holds that every sale that is not for resale is retail" (R. 720a). Dr. Moore (also a marketing expert witness for the Secretary), who had participated in a legislative council study which, among other things, considered a redefinition of the Tennessee sales tax, pointed out that "the major factor" in retaining the present definition was simply "the financial one * * * it brings in more money," adding: "I don't believe that anyone would argue that the sales tax is intended to be exclusively retail sales tax" (R. 746a).

"regarded their purchases of tires at discounts as wholesale purchases" (R. 900a). These customers, indeed, emphatically denied that they purchased at retail.[8]

4. The district court concluded as a matter of law that, in making the exemption turn on whether the sales were "recognized as retail sales or services in

[8] Some 22 such customers, all of whom operated 10 or more commercial vehicles—were called by the Secretary as witnesses. Their characteristic response to the question "whether or not you were buying those tires at retail," was that they were *not* buying at retail, but at "fleet-owner discounts." A typical example is the response of a fruit and vegetable produce distributor (operating 20 vehicles including several refrigerated over-the-road tractor trailer trucks): "At retail, no. I was considered a fleet-owner truck and you have fleet owner discounts and we would buy at fleet owner discounts," which he considered as buying at "wholesale, yes sir" (R. 179a). A food manufacturer, operating 23 trucks, answered "I was buying them on the fleet owner's price * * * I would imagine that that was a discount from the retail price because of the volume of tires we were using" (R. 182a), and in response to a question on cross examination as to whether he would consider that "necessarily wholesale," said "I would think so" (R. 183a). Also, an official of a wholesale beer distributor operating 18 trucks, responded, "No," his company did not buy "at retail prices"—"we got a fleet discount" (R. 214a–215a); the superintendent of a bus line, operating 14 passenger vehicles testified that he purchased bus tires in quantity "at fleet discount" (R. 187a–188a); and an official of a dredging company operating 14 vehicles (including a number of Mack dump trucks and half-ton pickups), answered "we would be buying them below retail" (R. 187a). Similarly, the manager of an industrial laundry operating at least 75 trucks and cars, stated flatly: "we are *not* buying them [tires] at retail" (R. 170a, emphasis added).

After some 16 such witnesses had testified, counsel for defendants offered to stipulate that several remaining customer representatives who were subpoenaed by the Secretary would testify substantially the same as the others (R. 218a–219a).

the particular industry" (§ 13(a)(2)), Congress intended "to give recognition to the particular industry's own classification of those sales which are by it considered to be retail sales under the Act" (R. 38a). Finding that the word "retail" was used in the tire industry to denote any sale not for resale, regardless of any functional differentiations among the various classes of such sales,[7] the court held respondent to be exempt as a "retail and service establishment" under § 13(a)(2) and (4) (R. 39a).

The court of appeals affirmed, upholding the district court's finding of the industry's word usage as not clearly erroneous and by implication approving its interpretation of the statute. Although the court referred frequently to the industry's "practices," "customs," and "habits," the context in each case makes clear that it was referring only to the industry's linguistic practices and, like the district court, regarded any functional differentiation among classes of sales (in price, quantity, use, etc.) to be irrelevant.[8]

[7] "In the tire industry sales for resale are recognized to be wholesale sales. Whereas, sales of tires to consumers or users of same are recognized to be retail sales regardless of the character or identity of the purchaser, the use to which the tires may be put, the quantities purchased or the price paid for such tires." Finding 9, R. 34a; see also Finding 14, R. 36a.

[8] See, *e.g.*, its reliance on the testimony of the "Big Four" representatives who "related the customary practices and habits in the tire industry" as being that: "Where the sale was made to an ultimate consumer it was regarded as [*i.e.*, called] retail whether made to an individual for his personal use, to a business, industrial firm, trucking or bus company and irrespective of quantity, price or discounts" (R. 898a). See also its reliance on the testimony of Dr. Leigh that the industry's "practice" was to "call" sales not for resale "retail" (R. 899a),

While the court did not advert to the question of interpretation as such, its opinion as a whole thus makes clear that it, like the district court, interpreted "recognized as retail," as used in the statute, to mean "labeled as retail" and nothing more.

ARGUMENT

Introduction and Summary

Section 13(a)(2) of the Fair Labor Standards Act, with exceptions not in issue here, provides that the minimum-wage and overtime provisions shall not apply to "any employee employed by any retail or service establishment." A "retail or service establishment" is defined as any establishment 75% of whose annual dollar-volume of sales "is not for resale and is recognized as retail sales or services in the particular industry." Respondent's sales of tires to other dealers for resale were less than 25% of its total sales, but its "sales for resale," plus its sales of tires and services to trucking companies, "fleet" owners, and governmental agencies totalled far more than 25%. Respondent's exemption turns, therefore, upon whether the latter sales were "recognized as retail sales or services in the particular industry." The answer to that question depends in turn upon the meaning to be given to the quoted phrase.

Regardless of who is charged with characterizing particular business transactions as either "retail" or

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and on the testimony of Marsh and Hedlund (R. 898a), who repeatedly referred to the industry's "terminology," "nomenclature," or "verbiage" (*e.g.*, Marsh R. 321a, 322a; Hedlund R. 694a–695a; 639a).

"other than retail" for purposes of the Fair Labor Standards Act, at least two separate questions must be answered. First, it has long been recognized that the sale of certain types of goods (*e.g.*, manufacturing machinery) and the furnishing of certain types of services (*e.g.*, lending money) fall wholly outside the purposes of the statutory exemption and do not come within the Act's "retail" concept at all, whatever the quantity or price terms of the particular transaction. See *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290. An initial question which must always be answered, therefore, is whether the sale of goods or services of a particular type can ever be "recognized" as retail. The second question concerns the manner in which goods which can be sold at "retail" are in fact sold. For example, it is necessary to determine whether an unusually large quantity of goods and services sold at a discount price—a sale which, from the seller's point of view, is substantially the same as a sale for resale—may be considered a "retail" sale.

Thus the present case requires both (1) a determination whether the sales of tires and tire repair and maintenance services designed or adapted specially for the operation of large truck or bus carriers in interstate commerce can ever be considered retail; and (2) a determination whether sales of tires and services of a type which could be sold at retail are retail sales when sold to "fleet" operators or government agencies in unusually large volume at quantity discount prices. If these two determinations are to be made by inquiring how Congress contemplated such

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sales would be considered, it is, we believe, clear that neither would be considered retail.

Both the House Conference Report and the Report of the majority of Senate Conferees, made clear that "the amendment * * * does not exempt an establishment engaged in the sale and servicing of manufacturing machinery and manufacturing equipment used in the production of goods [for interstate commerce] * * *" (95 Cong. Rec. 14932), "[n]or * * * change the status of * * * establishments selling industrial goods and services to manufacturers engaged in the production of goods for interstate commerce and to other industrial and business customers (such as the establishment held nonexempt in *Roland Electric Co.* v. *Walling*, 326 U.S. 657)" (95 Cong. Rec. 14877).* If Congress regarded the sale of "manufacturing equipment" for use in producing goods for commerce as wholly outside the retail concept, the same view would necessarily follow, we submit, with respect to the sale of a truck tractor-and-trailer rig specifically designed for "over-the-road" hauling in interstate commerce, the sale of earth-moving equipment used in highway and river-improvement construction, or, as here, the sale of tires of a type and size suitable for use only on such vehicles, and the sale of tire-maintenance services of a type used only by large-scale commercial carriers. (See *infra*, pp. 35–38.) What Congress contemplated as to volume sales at a quantity discount is also clear from the

* Only this type of sales is in issue in *Wirtz* v. *Idaho Sheet Metal Works*, 335 F. 2d 952 (C.A. 9), certiorari granted, 380 U.S. 905.

legislative history. Senator Holland, the sponsor of the 1949 Amendment in the Senate, stated repeatedly and unequivocally that he thought that a sale "in such quantity that discounts are allowed" would "[o]f course" be "in the category of wholesale sales" (95 Cong. Rec. 12501) and that, "[A]s a general rule, sales in quantities substantially larger than those to the average buyer and at a substantial discount are regarded as wholesale and not as retail" (*id.*, 12505).

The courts below have held, however, that Congress did not intend to decide for itself—and did not intend to authorize the Administrator of the Act and the courts to decide—what was meant by "retail" sales for purposes of the statutory exemption. The holding below is that Congress intended both the question what types of goods and services could be sold at retail and the question what quantity sales at a discount would be considered retail to turn solely on a finding of fact as to how the word "retail" was used in each particular industry. Thus the primary issue in this case is whether the requirement that 75% of an establishment's sales be "recognized as retail * * * in the particular industry" presents a question of law to be resolved by the courts in light of the Congressional intent and the purposes of the exemption, or presents a question of fact as to usage of the term "retail" in a specific business.

We contend that the statutory phrase "recognized as retail * * * in the particular industry" simply means "accorded the treatment given retail sales in that industry," and that Congress therefore left for the determination of the Administrator and the re-

viewing courts two basic legal questions: (1) whether a sale of a particular type of goods or service can ever be considered retail; and (2) whether the manner of sale—for example, the quantity and price at which the goods are sold—so differs from the ordinary retail sales in the industry that the particular transactions were not in actual practice "recognized as retail sales or services in the industry."[10]

This conclusion is dictated, first, by the difficulties inherent in adopting a construction which makes the scope of the Act turn upon the labels used in an industry. An industry will rarely, if ever, have a single and uniform use of the word "retail." The concept is almost always used with different scope for different purposes by different people in the industry, as is the case in the tire industry. While a lexicographer could estimate the frequency of different uses of the term for purposes of giving order to a list of definitions, Congress could not have intended the scope of the Fair Labor Standards Act to turn on a counting of the frequency of uses of the term. Nor could it have meant the application of the federal

[10] Thus, to determine the legal question whether a particular sale of 2,000 pounds of sugar was "retail," the Administrator and the courts would have to look to the practices in the industry both to determine the volume in which sugar is normally sold to consumers and to determine whether this sale was recognized as retail by being accorded substantially the same treatment as an ordinary retail sale. Since sugar, unlike coal, is not normally sold by the ton, a sale of 2,000 pounds of sugar would be retail only if it were "recognized as retail * * * in the industry" by being accorded the same treatment as a normal retail sale, *i.e.*, if it was not sold at a substantial quantity discount like that accorded wholesale sales.

statute to turn on the scope of State sales tax acts or other determinants of the industry use of the word "retail" which are irrelevant to the purposes of the federal Act. Finally, making the application of the Fair Labor Standards Act depend upon industry word-usage inevitably means that the very parties regulated are free to determine whether they should be regulated—a consequence far too self-defeating to be attributed to Congress.

Beyond this, the legislative history of the Act demonstrates affirmatively that Congress intended to define the scope of the exemption as a legal concept and, indeed, made clear the areas it wished to exclude from the exemption, as this Court has already recognized in *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290. The leading spokesmen for the bill specified the only areas of prior law which they wanted to change and also defined the areas that were to remain unaffected, repeatedly denying the charges of the bill's opponents that the effect of the amendments would be to allow the individual industries to determine whether the Act would apply to them (a necessary consequence of the decision below).

I

AN INTERPRETATION OF THE STATUTE WHICH MAKES COVERAGE TURN ON HOW THE WORD "RETAIL" IS USED IN AN INDUSTRY DEPRIVES THE STATUTE OF RATIONAL CONTENT

Interpreting the statute so that applicability of the retail exemption depends on how the word "retail" happens to be used in a particular industry at best

makes its scope turn on a matter which is irrelevant to any statutory purpose and may leave the question of coverage to the wishes of the very parties regulated by the Act. Moreover, the search for a uniform industry-wide meaning for a term such as "retail" will involve seeking a will-o'-the-wisp; a single established meaning rarely, if ever, exists.

1. Since words are typically used with many different meanings, not only by different persons but by the same persons for different purposes, there is no reason to suppose that the word "retail" would have a single identifiable meaning in a particular industry—being always used in only one sense by all persons associated with the industry. As we have indicated in the Statement (*supra,* pp. 5–10), the word "retail" is, in fact, used with at least three different meanings in the tire industry. Perhaps the most frequent usage is that adopted by sellers of tires for the purpose of complying with State sales-tax statutes, which define retail sales as broadly as possible for the purpose of increasing State revenues. Under the normal State sales-tax definition, any sale not for resale is labeled "retail." However, this is by no means the sole usage of the word "retail" in the tire industry. The record shows that it is the frequent practice in this industry to make a three-way division of sales to reflect the functional operations of the particular business enterprise. See, *supra,* pp. 5–7. For this purpose, many sellers of tires (including respondent Steepleton) label only routine, over-the-counter sales of passenger tires as "retail." Commercial sales of truck tires to large-volume purchasers

such as trucking fleets, construction companies, airlines, and other commercial users are put in a separate operating division which is generally labeled "commercial," rather than "retail." A third division, handling sales for resale, is labeled the "wholesale" division. Finally, for another purpose, still a different system of nomenclature is prevalent in the tire industry. The term "retail" is used to refer to a particular pricing policy which is applied to ordinary, small-volume purchasers. The record here shows that large-volume customers—*e.g.*, "fleet accounts"—vigorously denied that they were buying tires at retail, insisting that their purchases were something quite different (see Statement, *supra*, p. 10). As the court of appeals noted, such customers "regarded their purchases of tires at discounts as wholesale purchases" (R. 900a).[11]

[11] Officials of two of the "big Four" tire companies—Goodyear and Firestone—testified that their companies did not ordinarily use the terms "retail" or "wholesale" at all, but rather designated their sales as "consumer" or "dealer" sales, together with other designations by type of tires or by price charged, usually distinguishing sales to consumer "fleet accounts," "national accounts," and "government" from sales to lesser "consumers" (R. 572a–574a, 647a, 610a–611a, 612a–613a, 639a–640a).

According to respondent's own expert witness, Dr. Leigh, "all substantial tire dealers do three types of business," distinguishing between "regular retail" (*i.e.*, sales to individual customers owning one or two vehicles) and "commercial sales" to "trucking companies and national accounts" (*i.e.*, "owners of from 5 to 1,000 trucks constitut[ing] the so-called commercial market")—"[n]ot only the volume purchased but the discounts allowed and the services required set this group apart from over-the-counter buyers" (R. 793a–796a).

See, also, the Code of Fair Competition for the Rubber Tire Manufacturing Industry (Code No. 174, adopted Dec. 21, 1933)—in the drafting of which representatives of the "Big Four" participated—distinguished "Consumers' Lists" from "Consumers' Preferred Wholesale Lists," defining the former as applicable "to

In the face of this admitted prevalence of several quite different usages of the term "retail" in this industry, the factual finding of the courts below that the word "retail" was used generally to denote any sale not for resale is meaningless except as a numerical count of the relative frequency of such usage. We do not dispute the finding that the word "retail" has been used in the industry most often to label all sales "not for resale." But we contend that Congress could not have meant the application of the Act to turn on a factual finding as to the relative frequency of the various uses of the word "retail" by different persons for differing purposes; for such a finding bears no possible relationship to any conceivable purpose of the retail exemption.[12]

2. Moreover, as District Judge Kirkpatrick pointed out in one of the earliest decisions following enactment of the 1949 Amendment, a necessary implication of interpreting "recognized as" to mean "labeled as"

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the sale of tires and/or tubes to owners of less than five vehicles," whereas the "Preferred Wholesale Lists shall apply to commercial operators of five or more vehicles." See Codes of Fair Competition, Vol. IV, p. 348 (GPO 1934).

[12] Even if the only use of the word "retail" in the industry were that adopted to conform to State sales-tax statutes—and this is the sole explanation of the broad definition of "retail" in the present case—to make the scope of the exemption from the Fair Labor Standards Act turn upon the scope of State tax statutes imputes to Congress a wholly irrational and self-defeating purpose. The greater the desire of the State to collect revenue (and therefore the broader the definition of "retail"), the narrower would be the scope of coverage of the federal statute. The scope of the federal statute would, moreover, vary from State to State in a way wholly unrelated to its purpose.

is that any industry making sales not for resale could agree on a uniformly broad usage of the word "retail" and thereby elect not to be subject to the Act.[13] This is so obvious and simple a formula for complete avoidance of the statutory condition as to elude only the most ignorant or unsophisticated businessman. Businessmen are no less entitled than Humpty-Dumpty to make words mean what they want them to mean, and if the statute was intended to turn solely on word usage, there is no reason why they should not take advantage of it and adopt whatever usage entitles them to the proffered benefit. And if that is so, the statute is reduced to the absurdity of saying that every industry selling goods not for resale "shall" pay minimum wages, if, but only if, the industry is willing.

The court of appeals' construction of the statute does more than offend good sense and the settled canon that exemptions from the Fair Labor Standards Act are to be narrowly construed (*e.g., Phillips Co.* v. *Walling,* 324 U.S. 490, 493; *Arnold* v. *Ben Kanowsky, Inc.,* 361 U.S. 388, 392; *Mitchell* v. *Kentucky Finance*

[13] "[T]he difficulties involved in taking what an industry thinks or says about itself as the final and decisive factor in determining what constitutes a retail service establishment within the meaning of the Act is thus apparent. I suppose that it would not be too difficult for any trade association to adopt a deliberate policy of calling its business a 'service' business, a policy which, if persisted in long enough, could ripen into such recognition in the industry as would support plenty of testimony very much like that the defendant here has produced." *Tobin* v. *Household Finance Corp.*, 106 F. Supp. 541, 545 (E.D. Pa.), reversed on other grounds without ruling on the exemption question, *sub nom. Mitchell* v. *Household Finance Corp.*, 208 F. 2d 667, 672 (C.A. 3).

Co., 359 U.S. 290, 295). It also raises serious doubts about the constitutionality of the statute. The way in which persons in an industry choose to define and use a word has no rational relationship to any purpose to be served by the Fair Labor Standards Act. A rule permitting industry members to decide for themselves whether the Act is applicable to them, or requiring one employer but not another to pay minimum wages solely because they use different dictionaries, would be arbitrary in the extreme, raising serious doubts about the consistency of the statute with the Due Process Clause.

II

THE LEGISLATIVE HISTORY OF THE PROVISION CONTRADICTS ANY INTENT TO MAKE THE INDUSTRY'S WORD USAGE CONTROLLING AND DEMONSTRATES AN INTENT TO MAKE THE DEFINITION OF "RETAIL" SALES A QUESTION OF LAW, RATHER THAN A QUESTION OF FACT

A. The primary purpose of the 1949 Amendment to the retail exemption is plain beyond debate. Congress was dissatisfied with an administrative construction of the term "retail" which was accepted by this Court in *Roland Co.* v. *Walling*, 326 U.S. 657—namely, that "retail" sales were only those to ultimate consumers "to meet personal rather than commercial" purposes (326 U.S. at 675).[14] What was objectionable was that this construction, if taken literally, made the business or nonbusiness purpose of the buyer the sole controlling test of "retail," regardless of the functional character-

[14] As shown below (*infra*, pp. 32–33), apart from the implications of this "dicta" in the *Roland* decision, Congress had no objection to *Roland's* holding and rationale.

istics of the sale, such as the nature, quantity, or price of the goods or services sold. The retail concept would not include even sales of ordinary consumer goods in ordinary consumer quantities at customary prices if the sales were made for any business use. Congress regarded a test that ignored these functional characteristics and focused only on the purpose of the buyer as "silly, illusory, and ridiculous" because it meant that, "if a housewife goes to a drygoods store to buy towels, that is a retail sale, but if the proprietor of a small hotel * * * goes into the same store, is served by the same clerk, buys the same number of towels, paying exactly the same price, under no circumstances can that sale be regarded as a retail sale, because it is for a business use" (95 Cong. Rec. 12494).

The 1949 Amendment, as explained by Senator Holland (sponsor of the amendment in the Senate), was "confined to [an] effort to get away from that kind of interpretation" (*id.*, 12494–95), and to "do away with this artificial distinction between a retail sale on the one hand and a business sale on the other, which, regardless of the size, and regardless of the fact that it is intrastate, can never be held to be a retail sale" (*id.*, 12498). In short, the basic purpose of the amendment was to have essentially similar transactions treated alike regardless of the business or personal purpose of the buyer. See *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 293–294.

B. The courts below have held that Congress intended to accomplish its objective by making the exemption turn upon a factual finding as to an in-

dustry's most prevalent use of the word "retail," without reference to the underlying purposes of the retail exemption and the functional characteristics of particular transactions. We submit that Congress used the phrase "recognized as retail * * * in the particular industry" to mean "accorded the treatment ordinary retail sales are given in such industry" and intended the courts to decide—in light of the functional characteristics of the transaction and the purposes of the exemption—(1) which, if any, sales of goods or services of the type in issue are retail in the industry and (2) whether the transactions in question are accorded essentially the same treatment as retail sales receive.

There is admittedly some ambivalence in the legislative history bearing on the significance of industry usage of terminology. Much of the discussion in the debates reflects an assumption or belief on the part of the sponsors that the functional characteristics which had traditionally explained and justified the retail exemption would closely coincide with the ordinary use of the word "retail" in each industry. Thus, they frequently spoke as if some pre-existing meaningful industry concept of "retail"—"discoverable in any industry by honest search"—would be the controlling standard. See 95 Cong. Rec. 12497, 12502, 12510, 12516, A4570. But the legislative history leaves little doubt that, in the final analysis, it was the objective functional characteristics of particular transactions—and not what they happened to be called—which was to control the scope of the statutory exemption. Whenever the suggestion was made that the amendment might be construed to permit industry

terminology to be determinative, there was not only emphatic denial of any such intent by the authoritative spokesman for the amendment, but explicit reaffirmation of the intent to preserve intact the statutory purpose of the original exemption and to make that purpose controlling. And this intent was reinforced by express endorsement of specific judicial rulings which were to remain unchanged by the amendment.

C. A clear indication that Congress intended to give a legal content to the phrase "recognized as retail * * * in the particular industry"—and did not regard it as simply a direction to look to industry terminology—is found in the use of that phrase in the Conference Reports. Certain types of transactions were there specified as excluded from the exemption. Although the conferees frequently stated their conclusions in terms of what was or was not generally "recognized" as retail, they plainly did *not* leave the door open to having these conclusions overturned by a factual finding of prevalence of a different word usage in the industry itself. Thus, the House Conference Report states conclusively that "[t]he amendment * * * does not exempt an establishment engaged in the sale and servicing of manufacturing machinery and manufacturing equipment used in the production of goods," adding by way of mere explanation that this is "because the sale and servicing of such equipment have never been recognized as retail selling or servicing in the industry which distributes or services that type of equipment." 95 Cong. Rec. 14932. Similarly, the statement that "there is no concept of retail selling or servicing in these industries" is simply the un-

challengeable legislative or legal predicate used to explain the inapplicability of the amended retail exemption to "banks, insurance companies, building and loan associations, credit companies, newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc." *Ibid.*

A similar intent to impose a legal definition of the kind of business which can be "recognized as retail" is evident in the Report of the majority of Senate Conferees, 95 Cong. Rec. 14877. It is there stated that "[t]he conference agreement exempts establishments which are traditionally regarded as retail," explaining that "establishments which do not now have the exemption because the selling or servicing in which they are engaged is not considered to be retail * * * will not become retail or service establishments under the provisions of the conference agreement." The Senate conferees, like their House counterparts, list and categorize types of businesses which are insufficiently related to the purposes of the exemption to be "recognized as retail."

Thus the Conference Reports themselves make evident the intent to give legislative or legal content to the statutory phrase "recognized as retail"—*i.e.*, to provide a legal standard which is not subject to rebuttal by showing a contrary word usage in the particular industry. This was the holding of *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, where a small-loan business, although characterized as "retail" by the industry itself, was held ineligible for the exemption. There the Court concluded that it was not "intended by the amendment to broaden the fields of business enterprise to which the exemption would apply,"

but only to broaden the standard to be applied to particular sales by "business enterprises otherwise eligible under existing concepts to achieve exemption" (359 U.S. at 294). In so holding, the Court necessarily construed the statute as turning on something other than the industry's word usage; it was on the meaning of the word "retail" as it was used by Congress, not as it was used by the industry, that the decision turned—*i.e.*, on a legal characterization, not simply a factual "finding" of the industry's word usage.

There is abundant evidence in the legislative history that the *Kentucky Finance* holding was dictated by a Congressional purpose—repeatedly emphasized in the debates—to preserve the basic limitations on the exemption as originally enacted. Knowing that sales of certain types of goods (*e.g.*, manufacturing equipment) and certain types of transactions (*e.g.*, sales in quantity at a discount price) had never been considered "retail" within the meaning of the exemption, the sponsors of the 1949 Amendment repeatedly and emphatically stated that nothing in the amendment was intended to change these results. Its only purpose was "to obviate the sweeping ruling * * * that no sale of goods or services for business use is retail" (H. Conf. Rep., 95 Cong. Rec. 14931)—to clarify "the doubt [which] arose because the Administrator and the courts * * * ruled that the sale of goods and services for business use, as distinguished from family or household use, was not retail" (95 Cong. Rec. 12492).

Senator Holland stated explicitly that "[t]he only substantial difference between the Administrator and his recommendation and the amendment which we

propose is that we propose to do away with this artificial distinction between a retail sale on the one hand and a business sale on the other * * *" (95 Cong. Rec. 12498). He made plain that his amendment was not to affect existing rulings concerning manufacturing equipment (see, *e.g., id.* at 12495, 12504, 12505), and that he intended the amendment to have no effect upon the "other-than-retail" characterization of quantity sales at a discount price (see, *e.g., id.* at 12497, 12501, 12505). He made a particular point of emphasizing that "[t]here cannot be found in this amendment any matter which breaks down in the slightest the exclusion of interstate commerce or interstate business from the purview of the law," *id.* at 12495, also at 12483 and 12497. Senator Holland assured the Senate as to this amendment, as he later did with regard to the companion "laundry" exemption, that "There is no thought at all of bringing about by the so-called Holland amendment any condition under which the present application of the present law with reference to interstate business is changed in the slightest jot or tit[t]le" (*id.* at 12483, 12503).

D. The sponsors of the bill and the conferees were equally emphatic in their denial of any purpose of allowing individual industries to determine for themselves the scope of the exemption. The possibility that the statutory language "recognized as retail" and some loosely expressed comments of the sponsors might be interpreted as allowing each industry to decide the scope of its own exemption occurred to both the proponents and opponents of the 1949 Amendment. They sought clarification from the sponsors, who vigorously denied any such intent. For

example, each time that Senator Holland, the sponsor of the amendment in the Senate, was pressed as to the implications of the language of the amendment, he flatly denied that the amendment was intended to "throw the situation wide open for each industry to determine whether its sales shall be considered retail" or to make controlling the interpretation "given to a 'retail sale' by a trade association" (95 Cong. Rec. 12501, 12510). The report of a majority of the Senate conferees confirmed those denials, expressly stating that it was not intended that "the views of trade associations * * * [or] the interpretation of any interested group should be regarded as controlling" and that the ultimate characterization was to be made by the Administrator and the courts on the basis of many factors, giving due weight "to the actual practice in the industry" (*id.*, 14877). In short, prompted by the expressed fears of several Senators that an interpretation might be adopted which would, in effect, permit each industry to determine whether its sales were exempt, the authoritative spokesman for the legislation expressly disavowed any such intent.

III

NEITHER SALES OF TIRES AND TIRE SERVICES OF A CHARACTER DESIGNED FOR LARGE INTERSTATE TRUCK AND BUS CARRIERS OR HIGHWAY CONSTRUCTION EQUIPMENT, NOR SALES TO "FLEET" OPERATORS AT QUANTITY DISCOUNT PRICES, ARE "RETAIL SALES" WITHIN THE MEANING OF THE RETAIL EXEMPTION

If the industry's own use of the word is not the touchstone of exemption, the ultimate characteriza-

tion of a sale as "retail" or not necessarily becomes a question of law to be decided on the basis of the functional characteristics of the sale. The bare words of the statute provide little guidance as to which functional characteristics should be determinative; the meaning of the word "retail" as used by Congress, and hence the standards to be applied in making the characterization must be deduced from the legislative history of the provision. Cf. *Mitchell* v. *Kentucky Finance Co., supra*. That history shows, at a minimum, (A) that the sale of goods and services of a character sold primarily to businesses for use in interstate commerce or in the production of goods for commerce is wholly outside the retail concept and (B) that, even if the goods or services are of a character otherwise within the retail concept, sales at substantial quantity discounts must be characterized as "other than retail."

A. SALES OF TIRES AND TIRE SERVICES DESIGNED FOR LARGE INTERSTATE TRUCK AND BUS CARRIERS OR HIGHWAY CONSTRUCTION EQUIPMENT ARE WHOLLY OUTSIDE THE RETAIL CONCEPT

1. Prior to its amendment in 1949, the wording of the retail exemption was: "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." 52 Stat. 1060, 1067. As this Court pointed out in *Roland Co.* v. *Walling*, 326 U.S. 657, 666–667, the purpose of the provision was to exempt those employers who were involved only in the *final* stage of distribution of goods to consumers, the stage which is "at the end of, or beyond, that 'flow of goods in com-

merce' which it is the purpose of the Act to reach.'" See, also, S. Rep. No. 884, 75th Cong., 1st Sess., p. 5. It was never part of the statutory purpose to exempt establishments supplying, in the initial or current stages of manufacturing, the materials and services "used by those who produce goods for interstate commerce"—for although such materials and services were to be "used" or "consumed" by the manufacturer-customers, they "remained actively in use in the production of the 'flow of goods in commerce'" (326 U.S. at 678). "The origin of this clause, § 13(a)(2), had nothing to do with establishments 'producing goods for [interstate] commerce.'" *Id.* at 667.

The sales and services involved in *Roland*—selling and servicing electrical equipment needed by manufacturers for the production of goods for commerce—

"'Without this clause such local establishments might find themselves technically covered by the Act, not because they were 'producing goods for [interstate] commerce,' but because, for example, they were retailing milk near a state line and, therefore, might be regarded as actually in interstate commerce when delivering retail sales of milk to local customers, all of whom were ultimate consumers of it for their personal use, but a small proportion of whom lived across the state line from the milk dealer. *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 571; *Phillips Co.* v. *Walling*, 324 U.S. 490, 497. Similarly, it was felt that without this exemption clause, the employees of a local merchant who purchased his goods from outside his State but retailed them all within his State to ultimate consumers across his counter, might, nevertheless, technically be covered by the Act as being actually 'in [interstate] commerce' because of his purchases, although his sales all might be at 'retail' and beyond the end of the 'flow of goods in commerce.' 83 Cong. Rec. 7393–7394, 7436–7438." *Roland Co.* v. *Walling*, 326 U.S. at 666–667.

did not come within the limited purpose of the exemption. To the contrary, "[t]o fail to cover in this Act the multitude of employees who are engaged in establishments like that of the petitioner and which supply the materials and services currently needed for the maintenance of productive machinery used by those who produce goods for interstate commerce would take the heart out of this Act. Savings resulting from substandard labor conditions would be reflected directly into competitive costs." 326 U.S. at 668.

The language of the *Roland* decision was not, however, limited to situations where the goods sold were manufacturing equipment designed for the production of other goods for commerce. In *dicta*, the Court also stated that the "retail" concept did not include sales made for business use but was limited to sales to private purchasers for personal use. Taken literally, the sale of identical goods, in identical quantities, on identical terms would be within the "retail" concept if the purchaser intended personal consumption but not if he intended to put the goods in a business use. The primary purpose of the 1949 Amendment, it seems clear, was to preclude making any such distinction among sales of goods and services sold on the same terms to both personal and business users.

The "clarification" was needed, the House conferees said, "to obviate the sweeping ruling * * * that no sale of goods or services for business use is retail" (H. Conf. Rep., 95 Cong. Rec. 14931). Senator Holland, the sponsor if the amendment in the Senate, likewise emphasized that the amendment was aimed only at

the "dicta" in the *Roland* opinion and its extension to all "business sales, no matter how small they may be and no matter how they may happen, in spite of the fact that they are completely intrastate" (95 Cong. Rec. 12497). The purpose was to make clear "that a business sale does not necessarily have to be a nonretail sale" (*id.*, 12495) and thus to "do away with this artificial distinction between a retail sale on the one hand and a business sale on the other, which, regardless of the size, and regardless of the fact that it is intrastate, can never be held to be a retail sale under" the existing rulings (*id.*, 12498).

Senator Holland assured the Senate that the actual result in the *Roland* case would "[d]efinitely not" be affected by the amendment. See, *e.g.*, *id.* at 12497, 12505. The reports of the conferees confirmed Senator Holland's assurances, expressly noting that the amendment was not intended to "exempt an establishment engaged in the sale and servicing of manufacturing machinery and manufacturing equipment used in the production of goods" (H. Conf. Rep., 95 Cong. Rec. 14932) or to "change the status of * * * establishments selling industrial goods and services to manufacturers engaged in the production of goods for interstate commerce and to other industrial and business customers (such as the establishment held nonexempt in *Roland* * * *)" (95 Cong. Rec. 14877, Statement of Majority of Senate Conferees).[16]

[16] See also statement by the Chairman of the House Conferees' Committee in submitting the conference report (95 Cong. Rec. 14942): "[T]he reference to *Roland Electrical Co.* v. *Walling* * * * should not mislead anyone into concluding that the conferees intended to reverse or nullify that decision."

2. The reasoning of this Court's decision in *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, determines conclusively that effect should be given to what the Conference Reports clearly state—that "the amendment * * * does not exempt an establishment engaged in the sale and servicing of manufacturing machinery and manufacturing equipment used in the production of goods * * *" (H. Cong. Rep., 95 Cong. Rec. 14932). This Congressional determination, like the decision not to exempt credit companies, was intended to be final "regardless of whether [such establishments] were thought of in [such] industry as engaged in 'retail' selling or servicing. 359 U.S. at 295. Here, as in *Kentucky Finance*, the controlling consideration is that "nothing in the debates or reports * * * suggests that Congress intended by the amendment to broaden the fields of business enterprise to which the exemption would apply." *Id.* at 294. Here, as there, "[a]ny residual doubt on this score is dispelled by the explicit and repeated statements of the sponsors of the amendatory legislation and in the House and Senate Reports * * *." *Id.* at 295. The Court's conclusion in *Kentucky Finance* is therefore controlling here. "In the light of the abundant pointed evidence that Congress did not intend that businesses like those of respondents be exempted from the overtime and record-keeping provisions of the statute by § 13(a)(2), [this Court] would not be justified in straining to bring respondents' activities within the literal words of the exemption." *Id.* at 296.

The reasons for denying an exemption to establishments "engaged in the sale and servicing of * * *

manufacturing equipment used in the production of goods" were clearly stated in the *Roland* case. The purpose of the retail exemption was to exempt those sales which occur "at the end of, or beyond, that 'flow of goods in commerce' which it is the purpose of the Act to reach." 326 U.S. at 666. The exemption was never intended to eliminate coverage of enterprises furnishing the tools and services needed and designed for the production of goods for commerce. To fail to cover these enterprises "would take the heart out of this Act." 326 U.S. at 668.

This purpose admits of no distinction between the sale or servicing of "manufacturing equipment" to produce goods for later shipment in commerce and the sale or servicing of equipment designed to transport goods in interstate commerce. A truck-tractor-and-trailer rig specifically designed for long-distance hauling and sold to a common carrier is surely as much of an "industrial" piece of equipment as were the electric motors and wiring sold and maintained by the Roland Company. Just as the sale of "manufacturing equipment" for use in producing goods for commerce is wholly outside the retail concept, so must be the sale of an "over-the-road" highway transport to be used directly *in* commerce or, as here, of tires of a type and size suitable for use only on such a vehicle. Far from being at the "end" of the flow of goods in commerce, the function performed by both types of sale is prior to and continuously supportive of the interstate transportation itself. Certainly no less than the equipment and maintenance services sold by the Roland Company, the tires and mainte-

nance services supplied to such interstate transports "remain[ed] actively in use" in the very midst of the "'flow of goods in commerce.'" *Roland Electrical Co.* v. *Walling*, 326 U.S. at 666."

3. In this case, while the record does not show the precise amount of such sales, there is no question that a considerable proportion of the tires sold or serviced

" This Court's other pre-1949 decisions, for the same reason, held that the exemption did not reach establishments performing services in the very midst "of the stream of interstate commerce" (*Phillips* v. *Walling*, 324 U.S. 490, 497), or servicing the transportation equipment of an interstate carrier for use in interstate commerce, since such carrier "does not use [such] services for its own purposes as an ultimate consumer, beyond the end of the flow of goods in interstate commerce" (*Boutell* v. *Walling*, 327 U.S. 463, 467).

The relevance of the "interstate" or "local" character of the businesses served by the establishment to the policies underlying the "retail" exemption is reflected also in the special exemption for laundries (§ 13(a)(3)) that was added at the same time that the definition of "retail or service establishments" was adopted. That provision, thought to be necessary because there was no "retail concept" in the laundry business, is applicable only if more than 75% of the laundry's business is for "customers who are not engaged in a mining, manufacturing, transportation, or communications business" and was thus, on its face at least, cast in different terms from the definition of "retail" establishments. Yet Senator Holland explained the provision as being intended to give to laundries "the same relief from the *Roland* decision as the other retail and service establishments" and as involving "the same distinction * * * between work done for families and that done for the little village barbershop, beauty shop * * * or for any of the other purely local establishments" (95 Cong. Rec. 12503). The parallel seen between the two provisions by Senator Holland, who was the sponsor of both, obviously cannot exist if the "retail" concept was so expanded by the amendment as to include even sales of goods and services to, and specially adapted for use by, "mining, manufacturing, transportation, or communications" businesses.

by respondent were of a size and type suitable only for use by, and in fact sold to, businesses for use in interstate hauling or highway construction—*e.g.* the large truck tires sold to common carriers for use on long-distance "over-the-road" tractor-trailer transports hauling from 20,000 to 30,000 pounds payload (R. 248a), and the huge "earth-mover" tires (weighing about 1,000 pounds and priced anywhere from $950 to over $2,000) used on heavy equipment engaged in highway or dam construction (R. 259a–262a). Admittedly, 75% of the respondent's recapping and repair services, alone comprising 35% to 40% of its gross dollar volume of sales, is performed on tires for trucks or other heavy industrial equipment of the commercial customers (R. 48a, 265a). The furnishing or servicing of the "wheels" for such instrumentalities of commerce is no more a "retail" function, nor less vital a link in the midst of the flow of commerce, than is the furnishing or servicing of manufacturing equipment to be used in the production of goods for commerce."[11] See *Mitchell* v. *Lublin*, 358 U.S. 207; *Mitchell* v. *Vollmer*, 349 U.S. 427; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13; *Boutell* v. *Walling*, 327 U.S. 463. Such a function had never

[11] Indeed, the continuous tire maintenance service furnished by respondents for common carriers and other interstate truckers operating large fleets of trucks (*e.g.*, Southwestern Transportation Company, Gordon's Transport Company, and large wholesale distributors) for whom respondent provides daily, or on a regular basis, services at the customer's own place of business adapted to the needs of the business (79a–80a, 82a–83a, 109a–110a, 177a–178a), clearly constitutes production of goods "for commerce" as well as engagement "in commerce" within the meaning of the Act. (See *Alstate* and *Lublin*, *supra*).

previously been regarded as "retailing," and here, as in *Kentucky Finance,* the legislative history specifically disavowed any intent to change its status. The conclusion must be that the sale and servicing of such items, specifically adapted for use in industries engaged in commerce, is not within the "retail" concept.

B. TIRES AND SERVICES SOLD AT SUBSTANTIAL QUANTITY DISCOUNTS TO RESPONDENT'S GOVERNMENTAL AND COMMERCIAL "FLEET" CUSTOMERS ARE NOT "RECOGNIZED AS RETAIL" BECAUSE THEY ARE TREATED IN A WAY SIGNIFICANTLY DIFFERENT FROM THE TREATMENT ACCORDED ORDINARY RETAIL SALES

To the extent that the retail concept may be held applicable to the tires and services sold by respondent, a different question arises, *i.e.,* whether particular sales were made at "retail" or "wholesale." As we have shown, that determination cannot turn merely upon the way the industry chooses to define the word "retail," but must depend upon whether these sales were "recognized as retail" in the industry by being accorded substantially the same treatment given ordinary retail sales. This, in turn, depends upon the quantity and price at which the tires were sold—the two factors which the sponsors of the amendment thought should be of central importance.

In discussing the effects of the 1949 Amendment, Senator Holland repeatedly indicated his belief that sales at quantity discounts were not and could not be treated as "retail." He emphasized that the amendment dealt only with "sales which are so small in size that they cannot in any sense be called wholesale or cannot in any sense be subject to discounts because of large size" (95 Cong. Rec. 12495). Although he

thought it "impossible to distinguish" between admittedly retail sales "in small volume" to private purchasers and "sales to a local hotel or local laundry or to a local business building or city hall or courthouse or any other business place, when the sale is a part of the normal, everyday retail business, assuming that the sale is not made in such quantity that discounts are allowed" (*id.*, 12501), he immediately added: "Of course, if it is [*i.e.*, sold at quantity discounts], it comes in the category of wholesale sales" (*ibid.*). In later submitting a list of questions and answers showing the application of the amendment, Senator Holland again confirmed that view, stating that: "As a general rule, sales in quantities substantially larger than those to the average buyer and at a substantial discount are regarded as wholesale and not as retail" (*id.*, 12505).

In this case, the Administrator has adopted and published specific standards by which to determine when the discounts allowed on sales of tires or services to owners of fleets of motor vehicles or to governmental units are sufficient to constitute a recognition that that class of sales, because of the nature of the customer and the potential or actual volume of its purchases, is unlike the normal over-the-counter sales to other customers. Under these standards (set forth in the App. A, *infra*, pp. 43–46), sales of tires are treated as "other than retail" only when made to customers operating five or more vehicles and, even then, only when made at prices equivalent to or less than those charged on sales for resale—*i.e.*, only when the seller

treats the sales as similar to sales for resale.[19] Sales to governmental units are treated as "wholesale" only if made "pursuant to a formal invitation to bid"—a method of purchase which is generally used only for large-volume purchases at special discount prices. Sales of services and repair work to owners of fleets of vehicles are treated as "wholesale" only when made "at a price below the prevailing retail price" to the owner of five or more vehicles.[20] These standards are well within those supported by the history of the Act and are, if anything, overly generous to tire dealers.

Respondent ignored the Administrator's standards and offered no evidence on the percentage of its sales of tires and services which were made to such "wholesale" customers, although "it is clear that Congress intended that 'any employer who asserts that his establishment is exempt must assume the burden of proving that at least 75 percent of his sales are recognized in his industry as retail.' " *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 393, quoting the remarks of Senator Holland; see, also, 95 Cong. Rec. 14877 (Report of

[19] If the establishment makes no sales of passenger tires for resale, the wholesale price is considered that which is typically charged in the area for such sales. If, in the case of truck tires, the establishment makes no sales for resale, the wholesale price is that charged fleet accounts operating ten or more commercial vehicles. App. A, *infra*, p. 44.

[20] The Wage and Hour Administrator's Interpretative Bulletin also classifies as "other than retail," sales made to "national accounts," *i.e.*, sales in which delivery is made by a local tire dealer under a centralized pricing arrangement between the customer's national office and the tire manufacturer. Since respondent's "national account" sales, added to the sales for resale, would not by themselves exceed the 25% tolerance, they would not be determinative of the exemption issue in the instant case.

Majority of Senate Conferees) and 95 Cong. Rec. 11004, 11116, 12502. Respondent is thus not entitled to the exemption if, as we contend, sales to such customers at "wholesale" discounts are not retail.[21]

CONCLUSION

Under the standards outlined above respondent's non-retail sales would clearly exceed 25% of its total annual dollar volume of sales, and it therefore fails

[21] The reason for respondent's failure to attempt to meet its burden of proof may be found in the record. The Labor Department's wage-hour investigator testified at length as to the character of respondent's sales. He applied the Administrator's standards rigorously except for also treating as wholesale "fleet" sales certain sales at discount prices to large-volume, governmental purchasers, regardless of whether the sales were made "pursuant to a formal invitation to bid." Even the incomplete information available to him (based on respondent's records, plus information obtained from respondent's customers) showed that respondent's "wholesale" sales under these standards and its sales-for-resale together exceeded 25% of its total annual dollar-volume of sales. R. 34, 37, 126–127, 192, 195, 238, 789 (sales for resale); R. 131–132, 135, 154–156, 160, 190–192, 196–202, 208 (fleet sales at wholesale prices); R. 132–135, 144–148, 156–158, 195, 789 (sales of services to "fleets" at discount prices); R. 158–160, 189–190, 193, 195, 199–200, 789 (sales pursuant to formal invitation to bid); see, also, "national account" sales (n. 20, p. 40, *supra*), R. 128–130, 141–144, 150–151, 203–207, 227–228, 789. (Small "a" omitted from record references.)

to qualify for the "retail" exemption. Accordingly, the judgment below should be reversed.

Respectfully submitted.

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AUGUST 1965.

APPENDIX A

PLAINTIFF'S EXHIBIT 6

TITLE 29—LABOR

CHAPTER V—WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

PART 779—RETAIL OR SERVICE ESTABLISHMENT AND RELATED EXEMPTIONS

AUTOMOTIVE TIRE TRADE

§ 779.37 *Application of the 13(a)(2) and 13(a)(4) exemptions to the automotive tire trade.*

(a) It is the purpose of this section to show generally how the 13(a)(2) exemption applies to establishments engaged in the sale of tires, tubes, accessories and repair services on tires, and how the 13(a)(4) exemption applies to establishments engaged in retreading and recapping tires.

(b) In applying the tests of the exemption under section 13(a)(2), all sales of tires, tubes, accessories and tire repair services, including retreading and recapping, are recognized as retail in the industry, except those set out in subparagraphs (1) to (6) of this paragraph:

(1) Sales for resale: For example, sales of tires, tubes, accessories or services to garages, service stations, repair shops, tire dealers and automobile dealers, to be sold or to be used in reconditioning vehicles for sale are sales for resale. (It should be noted that in determining whether the establishment meets the

tests of the exemption, section 13(a)(2) of the Act treats all sales for resale the same as sales which are not recognized as retail in the particular industry.)

(2) Sales made pursuant to a formal invitation to bid: Such sales are made under a procedure involving the issuance by the buyer of a formal invitation to bid on certain merchandise for delivery in accordance with prescribed terms and specifications. Sales to the Federal, state, and local governments are typically made in this manner.

(3) Sales to "national accounts" as known in the trade, this is, sales where delivery is made by the local tire dealer under a centralized pricing arrangement between the customer's national office and the the tire manufacturer; payment may be made either to the local dealer or direct to the tire manufacturer under a centralized billing arrangement with the customer's national office.

(4) Sales to fleet accounts at wholesale prices: As used in this section, a "fleet account" is a customer operating five or more automobiles or trucks for business purposes. Wholesale prices for tires, tubes, and accessories are prices equivalent to, or less than, those typically charged on sales for resale. If the establishment makes no sales of passenger car tires for resale, the wholesale price of such tires will be taken to be the price typically charged in the area on sales of passenger car tires for resale. If the establishment makes no sales of truck tires for resale, the wholesale price of such tires will be taken to be the price charged by the establishment on sales of truck tires to fleet accounts operating 10 or more commercial vehicles, or if the establishment makes no such sales, the wholesale price will be taken to be the price typically charged in the area on sales of truck tires to fleet accounts operating 10 or more commercial vehicles.

(5) Sales of a tire rental service on a mileage basis known in the trade as "mileage contracts": This is a leasing arrangement under which a tire dealer agrees to provide and maintain tires or tubes for motor vehicles of a fleet account.

(6) Sales of servicing and repair work performed under a fleet maintenance arrangement on tires for trucks and other automotive vehicles whereby the establishment undertakes to maintain the tires or tubes for a fleet account at a price below the prevailing retail price.

(c) If more than 50 percent of the establishment's annual dollar volume of sales is made within the State in which the establishment is located and if 75 percent or more of the establishment's annual dollar volume of sales consists of sales which are not for resale and are recognized as retail sales of goods or services in the industry, the exemption under section 13(a)(2) will apply to all employees employed by the establishment except those employees who are engaged in the recapping or retreading of tires for sale or in other manufacturing or processing of goods for sale.

(d) The retreading or recapping of a customer's tires constitutes a service which may be recognized as retail in the industry in accordance with the above tests. However, where the recapping or retreading work is performed on tires which the establishment expects to sell in their reconditioned form, such activities are not performed as a service for a customer but constitute manufacturing goods for sale. Employees performing such work may be exempt only if they are employed by the establishment and all of the following tests of the section 13(a)(4) exemption are met:

(1) The establishment must qualify as an exempt retail establishment under section 13(a)(2), as explained above.

(2) More than 85 percent of the establishment's annual dollar volume of sales of the tires which it retreads or recaps for sale must be made within the State in which the establishment is located.

(3) The retreaded or recapped tires which the establishment makes or processes must be made or processed at the establishment which sells them.

(4) The establishment must be recognized as a retail establishment in the industry.

(e) An establishment engaged in retreading or recapping of tires is recognized as a retail establishment in the industry if it does not derive from the sale of tires retreaded and recapped for sale more than 50 percent of the annual dollar volume of its sales resulting from its retreading and recapping operations.

Signed at Washington, D.C., this 16th day of February 1959.

CLARENCE T. LUNDQUIST,
Administrator.

Filed February 24, 1959; 8:46 a.m.
Published in Federal Register February 25, 1959 (24 F.R. 1362), effective March 28, 1959.

APPENDIX B

STATUTES INVOLVED

Sections 6, 7, and 13 of the Fair Labor Standards Act of 1938 (52 Stat. 1060, as amended, 29 U.S.C. 206, 207, and 213) provide in relevant part as follows:

SEC. 6. MINIMUM WAGE

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) not less than $1.15 an hour during the first two years from the effective date of the Fair Labor Standards Amendments of 1961, and not less than $1.25 an hour thereafter, except as otherwise provided in this section.

* * * * *

SEC. 7. MAXIMUM HOURS

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed; * * *

* * * * *

SEC. 13. EXEMPTIONS

(a) The provisions of sections 6 and 7 shall not apply with respect to—

* * * * *

(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, if such establishment—

(i) is not in an enterprise described in section 3(s) [*i.e.*, an enterprise with gross sales exceeding $1,000,000], * * *

* * * * *

A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; * * *

* * * * *

(4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided,* That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *

* * * * *

Section 13(a)(2) as worded prior to the 1949 Amendment:

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * * [52 Stat. 1067].

U.S. GOVERNMENT PRINTING OFFICE: 1965